# Petition

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81-1162

No. .....

# In the Supreme Court of the United States

OCTOBER TERM, 1981

CROWN PAINT COMPANY, a corporation,
*Petitioner,*

VERSUS

GEORGE BANKSTON, JR., an individual,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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*Attorney for Petitioner*
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December 21, 1981

## THE QUESTION PRESENTED

Can a paint manufacturer which sells 70% of its paint at retail directly to industrial customers, enter into a valid contract with one of its dealers that it will not call upon or sell paint to like industrial customers of such dealer; *i.e.*, is such a contract a permissible *vertical* restraint or is it a prohibited *horizontal* restraint of trade between competitors who sell at the same level of the market which is *per se* unreasonable, illegal and void under 15 U.S.C. §1?

## THE PARTIES

The petitioner is Crown Paint Company (hereinafter "Crown"), an Oklahoma corporation. Crown is a small, family-owned corporation, operated by John P. Evans and his wife, Faye, who are its only stockholders. Crown makes and sells paint. Its gross sales were $740,514.21 during fiscal 1975 and $963,971.95 during fiscal 1976, the two years involved in this case. Crown sells 70% of its paint directly to industrial customers like CMI Corporation who use Crown's paint to finish their manufactured products.

The respondent is George Bankson, Jr. (hereinafter "Bankston"), an individual citizen of Oklahoma. Bankston bought paint from Crown and resold it at retail. Almost all of Bankston's sales were to CMI Corporation (hereinafter "CMI"). CMI is a large manufacturer of heavy equipment which it sells in interstate and foreign commerce.

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No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1981

CROWN PAINT COMPANY, a corporation,
*Petitioner,*

VERSUS

GEORGE BANKSTON, JR., an individual,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA**

Crown respectfully prays for a writ of certiorari to review the decision of the Supreme Court of Oklahoma in its opinion filed September 22, 1981.

## THE OPINION BELOW

The opinion filed September 22, 1981, in Crown Paint Company v. George Bankston, Jr., Case No. 53,060 (including Case No. 53,428 involving attorneys fees), is reported in 52 Oklahoma Bar Journal 2187 and ___ P.2d ___. A copy of that opinion is set forth on pages 1a through 10a of the Appendix following this petition.

## STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) to review the decision of the Supreme Court of Oklahoma rendered September 22, 1981, on the grounds that the rights specially set up or claimed by Crown Paint Company under 15 U.S.C. §1, a statute of the United States, were denied to Crown by that opinion. Under 28 U.S.C. §2101(c) this Petition may be filed on or before December 21, 1981.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the Constitution of the United States which provides, in pertinent part, that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding . . ."

15 U.S.C. §1 which provides, in pertinent part, that:

> "Every contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

79 Oklahoma Statutes 1971, §1, which provides:

> "Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal."

## STATEMENT OF THE CASE

Crown Paint Company makes and sells paint in interstate commerce. Crown retails 70% of its paint directly to industrial customers.[1] These industrial customers use Crown's paint to finish their manufactured products which are sold in interstate and foreign commerce. Ten percent of Crown's sales are to painting contractors. The remaining 20% is sold to dealers like Bankston who sell the paint at retail (Appendix, pages 11a and 12a).

In 1974 Bankston asked John Evans, President of Crown, to make paint for Bankston to sell at retail to an industrial customer which Bankston refused to name. Bankston asked Evans to agree that Crown would not call on or sell paint directly to any of Bankston's customers. John Evans refused to make such an agreement. Evans testified that he told Bankston that such an agreement was unnecessary because it was the unilateral policy of Crown to refrain from calling upon customers to whom Crown was suppling paint indirectly through a dealer such as Bankston.[2] For the purpose of this petition we must ac-

---

[1] Such industrial customers include Star Manufacturing Company which makes metal buildings in Oklahoma and Georgia, W. H. Stewart Company which makes large tanks, Cline Industries which makes farm machinery, Rush Springs Manufacturing which makes cattle equipment, and CMI Corporation (the customer involved in this case) which makes heavy equipment. See paragraph 5 of the affidavit at page 12a of the Appendix to this brief.

[2] Such a unilateral policy, as distinguished from a bilateral agreement, is permissible under *United States* v. *Coalgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). Of course, a unilateral policy could be ended unilaterally as Crown did in this case.

cept the jury's implicit finding that Crown and Bankston did make such an agreement.

Crown sold paint to Bankston for resale to CMI in 1974 and 1975. In November of 1975 Finis Healy, a salesman for Crown, called upon Paul Husmann, purchasing agent for CMI, to solicit CMI's paint business. John Evans testified that this call was an inadvertent violation of Crown's unilateral policy because Finis Healy did not know that Crown was already supplying paint to CMI through Bankston. Bankston claimed that the salesman's call was a deliberate violation by Crown of the alleged contract that Crown would not compete with Bankston for CMI's business.

For the next several weeks Husmann persistently telephoned Healy and asked for price quotes which Healy declined to give. Then CMI announced that in the future it would purchase paint upon written price quotes. CMI solicited price quotes from several suppliers of paint in addition to Crown and Bankston.

Crown and Bankston both submitted price quotes for CMI's paint business as did several other paint suppliers. Crown began to sell paint directly to CMI and Bankston lost CMI's business.

Bankston was angry over losing the CMI business. He refused to pay Crown for $6,917.90 in paint. Crown filed this action on May 17, 1976 against Bankston upon that open account. Bankston filed a counterclaim on August 3, 1976 alleging that Crown and Bankston "had an agreement whereby plaintiff (Crown) would not call on any business to which defendant (Bankston) sold his products." Crown

filed a motion for judgment on the pleadings against Bankston's counterclaim arguing that "the agreement alleged by the defendant, George Bankston, in his counterclaim would violate 79 O.S. 1971, §1 *and 15 U.S.C. §1* as an agreement in restraint of trade." The motion was overruled.

Bankston filed on April 19, 1977, an amended counterclaim alleging "the agreement with plaintiff (Crown) that plaintiff would not call or solicit business from any of defendant's (Bankston's) customers in an attempt to sell directly to them, thereby invading defendant's territory or clientele." Crown filed on June 22, 1977, another motion for judgment on the pleadings or summary judgment. In its brief in support of that motion filed February 17, 1978, Crown urged:

> "The agreement alleged in defendant's counterclaim is a per se violation of 79 O.S. 1971, §1 *as well as The Sherman Act.* It is a naked restraint of trade with no purpose other than stifling competition between the plaintiff and the defendant for the business of selling paint and related products to CMI. Such agreements are prohibited per se." (Emphasis added)

That motion was overruled by the trial court on March 9, 1978, in a Journal Entry (Appendix, pages 13a-15a) which granted Crown partial summary judgment for $6,917.90 on the open account, but denied Crown summary judgment against Bankston's counterclaim and set it for trial (Appendix, page 13a). The counterclaim was tried to a jury on June 21, 1978, but that jury was unable to agree on a verdict.

Crown filed another motion for summary judgment on November 3, 1978. Crown argued that in his trial testimony Bankston had "admitted that he and Crown Paint Company were competitors for the sale of paint to CMI Corporation." Crown's brief urged "the agreement alleged in defendant's counterclaim is a per se violation of 79 O.S. 1971, §1 *as well as The Sherman Act.* It is a naked restraint of trade with no purpose other than stifling competition between the plaintiff and defendant for the business of selling paint and related products to CMI." The trial court overruled Crown's motion.

On November 8, 1978, Bankston recovered a jury verdict awarding him $67,259.95 against Crown for calling upon and selling paint to CMI.

In its Petition-in-Error filed December 8, 1978, Crown alleged that the contract upon which Bankston's counterclaim was based constituted "a per se restraint of trade contrary to Section 1 of the Sherman Anti-trust Act (15 U.S.C. §1)." Crown's brief to the Oklahoma Supreme Court argued:

> "Crown was Bankston's manufacturer, but Crown was also Bankston's competitor for the sale of paint to industrial customers such as CMI Corporation. Therefore, the alleged agreement between them that Crown would not comptete with Bankston for the sale of paint to any of Bankston's customers constituted a 'horizontal' division of market which is *per se* an illegal restraint of trade in violation of both Section 1 of the Sherman Act and 79 O.S. 1971, §1. The District Court committed error in refusing Crown's several motions for judgment as a matter of law under 15 U.S.C. §1 and 79 O.S. 1971, §1."

The opinion below acknowledged that Crown had based its argument upon "Federal Antitrust Laws":

> "In asserting that the restraint before us is a per se violation of the antitrust law, Crown argues that the alleged restraint is an agreement between competitors on the same market level to allocate territories or to minimize competition, and that such a restraint is properly characterized as a 'horizontal restraint' which have been held to be per se violations of the *Federal Antitrust Laws.*" (Emphasis added) (Appendix, page 5)

The opinion below denied Crown its rights under 15 U.S.C. §1 by affirming the judgment for damages against Crown for competing with Bankston for CMI's business. The contract not to compete upon which such damages were based was illegal and void per se under 15 U.S.C. §1.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Petitioner respectfully submits that the writ of certiorari should issue for five special and important reasons:

1. The decision below violated the Supremacy Clause of Article VI of the Constitution of the United States. The Oklahoma Supreme Court failed to follow Federal law and denied Crown its Federal right under 15 U.S.C. §1 to compete freely with Bankston for CMI's business.

2. The unique facts here present an important question of Federal antitrust law under 15 U.S.C. §1 which should be settled by this Court. That question is: If a manufacturer retails most of its product directly to con-

sumers, but also sells to a retailer for resale, is that manufacturer an upstream (vertical) supplier or a horizontal competitor of its retailer?

Frequently, the parties in an antitrust case have dual roles in the distribution system; *i.e.*, (1) a wholesaler may also sell as a retailer, (2) a retailer may sell as a wholesaler to other retailers, or (3) as in this case, a manufacturer may sell as a retailer directly to consumers as well as selling to retailers for resale.

The important question of Federal antitrust law under 15 U.S.C. §1 is whether the retail sales of such a dual manufacturer-retailer can be ignored.

The Oklahoma court specifically found that Crown was acting in its capacity as a retailer when it sold the paint to CMI:

> "Ultimately, Crown, acting in its retail capacity, did call upon and sell paint to Bankston's largest customer, CMI Corporation." (Appendix, page 2a)

The opinion below ruled, however, that for antitrust purposes it did not matter that Crown was also a retailer in direct competition with Bankston:

> "We agree with Bankston. The evidence reflects that *even if Crown was selling paint on the same market level as Bankston,* nonetheless . . . the relationship between Crown and Bankston was that of manufacturer and dealer. The agreement under consideration was between manufacturer and dealer, and not . . . two dealers. The agreement was by Crown as manufacturer, with Bankston as its dealer or customer, that Crown would not sell to . . . Bankston's customers, and thus was a restraint not to compete

> *between two parties operating on different market levels,* i.e., a 'vertical restraint'. (Emphasis added)
>
> "An agreement of this kind between manufacturer and a customer/distributor . . . does not in itself violate anti-trust provisions." (Appendix, page 6a)

The Oklahoma Supreme Court recognized, but treated as irrelevant for antitrust purposes, the undisputed fact that Crown sold 70% of its paint at retail to industrial customers such as CMI in direct competition with Bankston (Appendix, page 12a). The court below ruled that Crown and Bankston were not competitors as a matter of antitrust law even though the court recognized that Crown and Bankston were "selling paint on the same market level."

This holding below is in conflict with the decisions of this Court which have held that the realities of substance are controlling over form in Federal antitrust law.

> "Realities must dominate the judgment . . . The Anti-Trust Act aims at substance." *Continental T.V., Inc.* v. *GTE Sylvania Incorporated,* 433 U.S. 36, 47, 97 S.Ct. 2549, 2556, 53 L.Ed.2d 568 (1977).

Substance rather than form controls:

> "If we look at substance rather than form, there is little room for debate. These must be classified as horizontal restraints.
>
> * * *
>
> "We seek the central substance of the situation, not its perifery; and in this pursuit, we are moved by the identity of the persons who act, rather than the label of their hats." *United States* v. *Sealey, Inc.,* 388 U.S. 350, 352-353, 87 S.Ct. 1847, 1850, 18 L.Ed. 1238 (1967).

Thus, in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), this Court looked through the form of ostensibly vertical customer restrictions imposed by Topco to conclude that the restraint was, in reality, horizontal in nature because made between competitors.

In this case it can not be disputed that, in reality, Crown and Bankston were natural competitors for CMI's paint business. Indeed, Bankston himself recognized that Crown was naturally his competitor by asking for a non-competition contract:

> "In entering into this contract, Mr. Bankston, *seeking to protect his business*, indicated to the president of Crown that he wanted Crown to agree that Crown would not call on anybody Bankston was selling Crown products to, and that if Crown ever found out it was selling to one of Bankston's customers, Crown would back out." (Emphasis added) (Appendix, page 2a)

This Court should settle this important question of Federal antitrust law by ruling that the reality of actual competition between a manufacturer and a retailer who are the parties to an anticompetitive contract is controlling over the ostensibly vertical form and that such a contract is a horizontal restraint which is a per se violation of 15 U.S.C. §1.

3. This is a case of first impression. Naked contracts not to compete seldom are presented to this Court. Never before, in its reported decisions, has the Court had the opportunity to strike down an award of damages based upon *violation* of a contract not to compete. Antitrust cases

usually involve damages resulting from a *restraint* on competition. Here the damages resulted from *competition* in violation of a contract not to compete. Allocation of customers between competitors has been held to be a per se violation of Section 1 of the Sherman Act by two Courts of Appeal. *United States* v. *Consolidated Laundries Corporation*, 291 F.2d 563 (CA 2 1961); *United States* v. *Cadillac Overall Supply Company*, 568 F.2d 1078 (CA 5 1978).

In this case, this Court has a rare opportunity to decide this important question of Federal antitrust law under 15 U.S.C. §1 by ruling that allocation of customers is per se illegal; and that damages can not be recovered by one competitor from another for the violation *through competition* of a contract not to compete.

Such a contract not to compete should be condemned as a per se violation of 15 U.S.C. §1. It is not possible for any contract to more completely fit the per se rule:

> "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal . . ." *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).

The very purpose of this contract was to kill competition. This contract had no virtue whatsoever to redeem it.

4. This case offers an important and special opportunity for this Court to clarify the Federal law meaning of "vertical" and "horizontal" as used in restraint of trade classifications. Unlike the opinion below, this Court has never classified a contract not to compete between a re-

tailing manufacturer and one of its retailers as "vertical." In this case, this Court can settle the Federal law by holding that a manufacturer who retails most of its products is not vertical, but rather horizontal in relationship to its own retailers.

5. This case presents a unique opportunity to settle an important question of Federal antitrust law under 15 U.S.C. §1 as to the distinctions between territorial restraints and customer restraints. The facts in this case make that opportunity more useful because there are no cluttering elements such as price-fixing to confuse the issues.

*Topco*, supra, and *Continental T.V. Inc.*, supra, involved both territorial restraints and customer restraints. Likewise *White Motor Company* v. *United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963), involved both territorial and customer restraints. Confusion as to the distinctions between territorial restraints on the one hand and customer restraints on the other is evident in the opinion below which called this customer restraint "a territorial restraint":

> "The agreement was . . . that Crown would not sell to others within Bankston's 'exclusive territory', i.e., Bankston's customers . . .
>
> * * *
>
> "In this instance, *the exclusive territory* within which Bankston had exclusive rights to sell *was Bankston's customers, primarily CMI.*" (Emphasis added) (Appendix, page 6a)

In other words, the Oklahoma court held that Bankston's *customers* constituted an exclusive *territory* upon which Crown could not poach.

It is respectfully submitted that this Court should settle this important question of Federal antitrust law under 15 U.S.C. §1 in this case by ruling that customers can never be an "exclusive territory" between competitors. Customer restrictions, even between manufacturers and dealers, are inherently more destructive of competition than territorial limitations. As observed by Mr. Justice Brennan in his concurring opinion in *White Motor Company* v. *United States*, 372 U.S. 253, 272, 83 S.Ct. 696, 707, 9 L.Ed.2d 738 (1963):

> "I turn next to the customer restrictions. These present a problem quite distinct from that of the territorial limitations. The customer restraints would seem inherently the more dangerous of the two, *for they serve to suppress all competition between manufacturer and distributors for the custom of the most desirable accounts.*' (Emphasis added)

In *Topco* this Court struck down customer restraints:

> "We also strike down Topco's other restrictions on the right of its members to wholesale goods. These restrictions amount to regulation of the *customers* to whom members of Topco may sell . . . For the reasons previously discussed, the arena in which Topco members compete must be left to their unfettered choice . . ." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 612, 92 S.Ct. 1126, 1136, 31 L.Ed.2d 515 (1972).

This case is an opportunity to rule that an allocation of customers between competitors can never be legitimized by calling a customer an "exclusive territory" as the Oklahoma Supreme Court did in this case.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision and opinion of the Supreme Court of Oklahoma.

Respectfully submitted,

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*Attorney for Petitioner*
*upon whom service is to be made*

December 21, 1981

## CERTIFICATE OF SERVICE

I hereby certify that on the ..... day of December, 1981, three (3) copies of the Petitioner's Petition for Writ of Certiorari were mailed, postage prepaid, to Counsel for the Respondent as follows:

Mr. Michael Gassaway
Miskovsky & Gassaway
802 Park Harvey Center
200 North Harvey
Oklahoma City, Oklahoma 73102

and I further certify that all parties required to be served have been served.

---

Bryce A. Baggett

# APPENDIX

# APPENDIX

FOR OFFICIAL PUBLICATION

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

| | | |
|---|---|---|
| CROWN PAINT COMPANY, | ) | No. 53,060 |
| | ) | [Consolidated |
| Appellant, | ) | with |
| vs. | ) | No. 53,428.] |
| | ) | |
| GEORGE BANKSTON, JR., | ) | FILED |
| | ) | SUPREME COURT |
| | ) | STATE OF OKLAHOMA |
| Appellee. | ) | SEP 22 1981 |
| | | ROSS N. LILLARD, JR. |
| | | CLERK |

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA
COUNTY, OKLAHOMA
HONORABLE DAVID M. COOK, JUDGE

In this case, we are asked to determine whether a contract between the manufacturer of paint and a retailer of paint, in which they agreed not to compete on the retail level, was a per se violation of 79 O.S. § 1 (1971), and/or a violation of 15 O.S. § 217. The precise issue before the Court is whether the trial court erred in failing to grant summary judgment, directed verdict, or judgment notwithstanding the verdict in favor of the paint manufacturer, whose position was that the alleged agreement was, under the above cited statutes, void and unenforceable.

Finding that the agreement before us does not constitute a violation under either 79 O.S. § 1 or 59 O.S. § 217, we affirm the trial court's ruling, as Appellant failed to present any evidence showing an illegal scheme, or unreasonable restraint in a given market.

AFFIRMED

[APPENDIX]

Bryce A. Baggett,
Oklahoma City, Oklahoma, For Appellant.

Michael Gassaway
Of the Firm:
Miskovsky & Gassaway
Oklahoma City, Oklahoma, For Appellee.

BARNES, V.C.J.:

I.

In 1973, after many years of experience in the paint business, George Bankston opened his own paint supply company, Professional Paint Supply, as the sole proprietor. In that business, Mr. Bankston purchased paint from manufacturers, then resold it to his clients, who were the ultimate users of the paint and the paint-related products. In an effort to insure that he would have a continuous supply of paint for resale, Bankston entered into a contract with Crown Paint Company, a manufacturer-wholesaler and retailer of paint and related products. In entering into this contract, Mr. Bankston, seeking to protect his business, indicated to the president of Crown that he wanted Crown to agree that Crown would not call on anybody Bankston was selling Crown products to, and that if Crown ever found out that it was selling to one of Bankston's customers, Crown would back out. Crown's president stated that it was Crown's policy not to attempt to sell to customers of those Crown sold to at wholesale, saying that if Bankston would make a list of his customers to whom Crown paint was going to be resold, Crown would not call on them or sell paint to them. Bankston, seeking further to protect himself, chose not to disclose the name of his customers. Ultimately, Crown, acting in its retail capacity, did call upon and sell paint to Bankston's largest customer, CMI Corporation.

The controversy before us began when Crown filed a suit on an open account against Bankston, seeking to col-

lect payment for paint sold to Bankston. Mr. Bankston filed a counterclaim alleging Crown's breach of their contract agreement not to compete. Crown received a summary judgment on its open account; no appeal was perfected from that judgment. After a series of continuances and mistrials, Bankston's action for breach of contract was submitted to a jury, which entered a judgment in favor of Bankston, fixing damages at $67,259.97.

Crown has perfected an appeal from that verdict and judgment (Case No. 53,060). Additionally, Crown perfected an appeal from the subsequent trial court order awarding attorney fees in the cause (Case No. 53,428). By prior order of this Court, these appeals have been consolidated.

Both in the trial court, and on appeal, Appellant, Crown Paint Company, argues that it was entitled to summary judgment against Appellee, Bankston, as a matter of law under 79 O.S. § 1 (1971), as said contract was between competitors on the same market level, to allocate territories or to minimize competition, i.e., a "horizontal restraint", which is a per se violation. Crown also argues that it was entitled to summary judgment against Bankston as a matter of law under 15 O.S. § 217 (1971), as said contract restricts a citizen from engaging in a lawful profession. Lastly, Crown argues that even if Bankston were to prevail, he is not entitled to an attorney fee.

II.

Title 79 O.S. § 1 (1971) provides:

> "Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within the state is hereby declared to be against public policy and illegal."

As we noted in *Teleco, Inc.* v. *Ford Industries,* 587 P.2d 1360 (Okl. 1978): "It has long been recognized that every agreement concerning trade, and every regulation of trade,

restrains trade to some extent, and that the very essence of such agreements is to bind or restrain."[1] Because a liberal application of the provisions of 79 O.S. 1971 § 1 would outlaw every conceivable contract or combination which could be made concerning trade or commerce, courts have read into statutes such as 79 O.S. § 1 a "rule of reason", under which only those acts, contracts, agreements or combinations which prejudice public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which injuriously restrain trade, are unlawful.[2]

Thus, as a general rule, only unreasonable restraints of trade, as measured by the "rule of reason", constitute a violation of statutes such as 79 O.S. § 1. However, certain restraints of trade, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and, therefore, per se violations.[3]

The first question before us is whether the alleged contractual agreement between Crown and Bankston constituted a per se violation of 79 O.S. § 1 (1971).

In *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 5, 2 L.Ed.2d 545, 549, 78 S.Ct. 514, 518 (1958), Mr. Justice Black, explaining the appropriateness of, and the need for, a per se rule in dealing with alleged violations of Section 1 of the Sherman Antitrust Act, stated:

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investi-

gation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken."

More recently, in the landmark case of *United States* v. *Topco Associates*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), the United States Supreme Court, in discussing the nature of agreements not to compete between competitors at the same market level, stated:

> ". . . One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint, in contradistinction to combinations of persons at different levels of the market structure, e.g., manufacturers and distributors, which are termed 'vertical' restraints. This Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' "

In asserting that the restraint before us is a per se violation of the antitrust law, Crown argues that the alleged restraint is an agreement between competitors on the same market level to allocate territories or to minimize competition, and that such a restraint is properly characterized as a "horizontal restraint", which have been held to be per se violations of the Federal Antitrust Law. Conversely, Bankston argues that the restraint is a vertical restraint, that is, a restraint not to compete between two parties operating on different market levels, and therefore must be measured by the "rule of reason", because vertical restraints are not per se violations of either Federal or State Antitrust Laws.

We agree with Bankston. The evidence reflects that even if Crown was selling paint on the same market level as Bankston, nonetheless in its relationship to Bankston, Crown manufactured the paint Bankston sold to the ultimate consumer, and the relationship between Crown and Bankston was that of manufacturer and dealer. The agreement under consideration was between manufacturer and dealer, and not two manufacturers or two dealers. The agreement was by Crown as manufacturer, with Bankston as its dealer or customer, that Crown would not sell to others within Bankston's "exclusive territory", i.e., Bankston's customers, and thus was a restraint not to compete between two parties operating on different market levels, i.e., a "vertical restraint".

An agreement of this kind between a manufacturer and a customer/distributor setting up an exclusive territory within which the customer/distributor will have exclusive rights to sell does not in itself violate anti-trust provisions.[4]

In this instance, the exclusive territory within which Bankston had exclusive rights to sell was Bankston's customers, primarily CMI.

An agreement between a manufacturer and customer allocating a specific limited territory exclusively to the customer, with competitive products readily available to others, has invariably been permitted as a *reasonable* restraint of trade.[5]

The record indicates that salable lines of other paint products manufacturers were fully available to Bankston's customers and to Bankston's largest customer, CMI.

This being the case, we hold that the trial court properly refused summary judgment against Bankston, for the agreement in question was simply an agreement between the manufacturer, Crown, and its customer, Bankston, allocating a specific limited territory exclusively to the customer, Bankston, i.e., Bankston's customers, with competi-

tive products readily available to others, and thus there is nothing in such an agreement which makes out a case of anti-trust violation.

Since Crown was not entitled to summary judgment or a judgment notwithstanding the verdict against Bankston, the trial court did not err in instructing the jury in Instruction No. 4 that the contract "subject matter was lawful" and refusing to instruct the jury concerning alleged anti-trust violations. As we said in *Kiddie* v. *Great Southwestern Fire Insurance Co.*, 601 P.2d 740 (Okl. 1979):

> "We have said it is the duty of the trial court to instruct on the issues raised by the pleadings and supported by the evidence — and nothing more. *Midland Valley Railroad Co.* v. *McKee*, 389 P.2d 492 (Okl. 1964), and thus it is not error to refuse a requested instruction not supported by any evidence. *Skogsberg* v. *First National Bank of Kingman, Ks.*, 439 P.2d 957 (Okl. 1968)."

As there was no evidence before the trial court to support any of Crown's anti-trust arguments, the trial court did not err as a matter of law in overruling Crown's motion for summary judgment or motion for judgment notwithstanding the verdict, or Crown's proposed instruction.

III.

We next consider whether the alleged contract between Bankston and Crown violated the provisions of 15 O.S. § 217 (1971), thus entitling Crown to summary judgment.

Chapter 4 of Title 15, which deals with unlawful contracts, provides, at Section 217, that:

> "Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by the next two sections, is to that extent void."

The next two sections, Sections 218 and 219, of Title 15, deal with matters not related to this suit, the former dealing with restraints in anticipation of a dissolution of a partnership, and the latter dealing with the sale of the goodwill of a business.

Crown argued, both in the trial court and on appeal, that the alleged contract between Bankston and Crown, whereby Crown agreed not to call on or solicit business from any of Bankston's customers in an attempt to sell directly to them, violated the provisions of 15 O.S. § 217 (1971), as such a contract would restrain Crown from exercising its lawful profession, that of manufacturing and selling Paint. In *Board of Regents, etc.* v. *Nat. Collegiate Ath. Ass'n*, 561 P.2d 499, 508 (1977), in determining whether an NCAA practice constituted a violation of 15 O.S. § 217, this Court stated that, "Statutes invalidating contracts in restraint of trade must be determined by its reasonableness in view of the particular circumstance. An agreement in illegal restraint of trade is void, but an agreement in reasonable restraint of trade is valid." [Footnotes omitted] Thus, we see that not all restraints of trade are outlawed by 15 O.S. 1971 § 217. Only those restraints which are unreasonable are outlawed.

As we discussed in part III of our opinion, the agreement in question was nothing more than a vertical agreement between a manufacturer and his customer allocating a specific limited territory exclusively to the customer. Where, as here, competitive products are readily available to others, such an arrangement has invariably been upheld as a reasonable restraint of trade. Since the only evidence before the court demonstrated a reasonable restraint of trade, Crown was not entitled to summary judgment, directed verdict, or judgment notwithstanding the verdict on this issue, and the jury was properly instructed concerning the lawfulness of the contract.

IV.

Lastly, we consider whether the trial court erred in holding that the prevailing party in this suit was entitled to attorney fees. We hold that the trial court did not err in so holding. Under the provisions of 12 O.S. § 936 (1971), the prevailing party in certain civil actions shall be allowed a reasonable attorney fee to be set by the court and to be taxed and collected as costs. That statute reads:

> "In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or *contract relating to the purchase or sale of goods, wares, or mercandise,* or for labor or services, unless otherwise provided by law or contract which is the subject [of] the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs." [Emphasis added]

The case before us was initiated as a suit on an open account in which Crown sought to receive the benefit of its contract — payment by Bankston. In his counterclaim, Bankston sought the benefit of his bargain, asking the court to award damages for breach of provisions not to compete. The prevailing party in the counterclaim action is entitled to attorney fees, as the suit involved is a suit on a "contract relating to the purchase or sale of goods, wares, or merchandise."

AFFIRMED.

HODGES, LAVENDER, SIMMS, DOOLIN, HARGRAVE, and OPALA, JJ., concur.

[Footnotes appear on following page]

[APPENDIX]

[1] Citing Board of Trade v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918).

[2] Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956); United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911); and Teleco, Inc. v. Ford Industries, Inc., 587 P.2d 1360 (Okl. 1978).

[3] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953); United States v. Consolidated Laundries Corporation, 291 F.2d 563 (N.Y. 1961); and Teleco, Inc. v. Ford Industries, Inc., 587 P.2d 1360 (Okl. 1978).

[4] United States v. Arnold, Schwinn & Company, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967); Colorado Pump Supply Company v. Febco, Inc., 472 F.2d 637 (10th Cir. 1973); Top-All Varieties, Inc. v. Hallmark Cards, Inc., 301 F.Supp. 703 (S.D.N.Y. 1969); Packard Motor Car Company v. Webster Motor Car Company, 100 U.S.App. D.C. 1961, 243 F.2d 418 (1957); Schwing Motor Company v. Hudson Sales Corporation, 239 F.2d 176 (4th Cir. 1956).

[5] United States v. Arnold, Schwinn & Company, supra; Teleco, Inc. v. Ford Industries, Inc., 587 P.2d 1360 (1978).

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

| | | |
|---|---|---|
| CROWN PAINT COMPANY, a corporation, Plaintiff, | ) | No. CJ-76-1539 |
| vs. | ) | FILED IN THE DISTRICT COURT |
| GEORGE BANKSTON, d/b/a PROFESSIONAL PAINT SUPPLY, Defendant. | ) | MAR 2 1978 Oklahoma County, Okla. DAN GRAY, Court Clerk |

AFFIDAVIT OF JOHN P. EVANS

STATE OF OKLAHOMA )
) SS:
COUNTY OF OKLAHOMA )

JOHN P. EVANS, of lawful age, being first duly sworn, deposes and states:

1. That he is the president and managing officer of Crown Paint Company, an Oklahoma corporation, * * *.

2. That during the year 1975 and for the first six months of 1976, he was in charge of the operations of Crown Paint Company and is familiar with all aspects of its operations;

3. That Crown Paint Company was in the business of manufacturing and selling paint, solvents and supplies related to painting during the year 1975 and the first half of 1976;

4. That during such time period approximately 70% of the sales of Crown Paint Company were to industrial customers such as CMI Corporation which used the products purchased from Crown Paint Company as a part of the customers' manufacturing process which produces equipment for sale; that approximately 10% of the sales of Crown

Paint Company were made to painting contractors; and that the remaining approximately 20% of the sales of Crown Paint Company were made to retail dealers such as the defendant George Bankston who resold paint and related products.

5. That CMI Corporation is among the class of industrial customers (along with Star Manufacturing Company, W. H. Stewart Company, Cline Industries and Rush Springs Manufacturing) who constituted approximately 70% (by dollar volume) of the total sales of Crown Paint Company during the time period of 1975 and the first six months of 1976; and that the defendant, George Bankston and Crown Paint Company were, by the nature of their respective businesses, direct competitors for the sale of paint and related products to an industrial customer such as CMI Corporation;

6. That he, John P. Evans, did not enter into any agreement of the nature and kind alleged by the defendant to the effect that Crown Paint Company would refrain from competing with the defendant George Bankston in the sale of paint to CMI Corporation; or any other customer; and that no other officer or responsible employee of Crown Paint Company entered into such an agreement with George Bankston.

7. Further affiant sayeth not.

(s) *John P. Evans*
JOHN P. EVANS

Subscribed and sworn to before me the undersigned notary public this 2nd day of March, 1978.

(s) *Elaine Petrea*
Notary Public

[SEAL]

My Commission Expires: July 8, 1979

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

| | | |
|---|---|---|
| CROWN PAINT COMPANY, a corporation, Plaintiff, | ) | No. CJ-76-1539 |
| vs. | ) | FILED IN THE DISTRICT COURT |
| GEORGE BANKSTON, d/b/a PROFESSIONAL PAINT SUPPLY, Defendant. | ) | MAR 9 1978 Oklahoma County, Okla. DAN GRAY, Court Clerk |

JOURNAL ENTRY OF PARTIAL SUMMARY JUDGMENT FOR PLAINTIFF AGAINST THE DEFENDANT

This matter came on to be heard this 6th day of March, 1978, upon the motion of the plaintiff for judgment on the pleadings or summary judgment. * * *, and the Court having examined the pleadings on file herein, having received and examined the excellent briefs submitted by counsel, finds and determines that the plaintiff's motion for summary judgment should be sustained in part and overruled in part as hereinafter set forth.

The Court finds that the plaintiff filed its petition herein on May 17, 1976, in which plaintiff alleged that the defendant was indebted to the plaintiff upon open account * * *.

1. The defendant filed an amended answer, offset and counterclaim on April 19, 1977, in which the defendant admitted that he was indebted to the plaintiff for the sum of $6,917.90, * * *.

* * *

3. There remaining no genuine issue of material fact in dispute between plaintiff and the defendant, the Court finds that the plaintiff is entitled to judgment against the defendant for the sum of $6,917.90.

[APPENDIX]

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against the defendant, for the sum of $6,917.90, * * *.

* * *

5. The Court finds that in his amended counterclaim filed April 19, 1977, the defendant alleged that plaintiff and defendant entered into an agreement that plaintiff would not call upon or solicit business from any of defendant's customers in an attempt by plaintiff to sell paint and related products directly to such customers; that plaintiff is a corporation engaged in the business of manufacturing paint and related products; that plaintiff breached such agreement by selling paint to CMI Corporation at a price below the price at which plaintiff was selling such paint to defendant; and that defendant was damaged by such violation of their agreement by the plaintiff.

6. Plaintiff filed its reply to defendant's amended counterclaim on June 22, 1977, in which the plaintiff denied the making of the agreement alleged by the defendant in such counterclaim. Further the plaintiff specifically alleged that the plaintiff is engaged in the business of selling paint to customers such as CMI Corporation, the customer to which defendant referred in his allegations of his counterclaim. Further the plaintiff denied that any "agency" existed between plaintiff and defendant. Further, the plaintiff's answer denied any stealth or trickery in learning the name of CMI Corporation as defendant's customer or in calling upon CMI Corporation for the sale of paint. The plaintiff's answer to defendant's counterclaim further alleged that plaintiff and defendant are competitors for the sale of paint to CMI Corporation and other industrial customers such as CMI Corporation and that any agreement of the nature in terms as alleged by defendant's counterclaim whereby plaintiff would refrain from competing with defendant for the sale of paint and related materials to CMI Corporation or similar customers would constitute an illegal agreement in restraint of trade and that such an agreement would be null, void and unenforceable.

7. In support of its motion for summary judgment the plaintiff has filed herein the affidavit of John P. Evans, the president of plaintiff, in which he makes the statement under oath that approximately 70% of the sales of Crown Paint Company were to industrial customers such as CMI Corporation during the period of time covered by the agreement alleged in defendant's counterclaim.

8. The Court finds that under these pleadings the plaintiff and defendant have joined issue on the question of fact of whether or not the defendant was the "agent" of the plaintiff for the sale of paint to CMI Corporation; the Court further determines that if the defendant succeeds in establishing by competent evidence that he was the agent of the plaintiff with respect to the sale of paint and related products to CMI Corporation, then defendant is entitled to prevail upon his counterclaim herein. The plaintiff takes exception to this conclusion of law by the Court contending that it is wholly irrelevant to any issue raised by the pleadings in this case whether or not the defendant was the "agent" of the plaintiff; that the only issue of fact under the pleadings is the question of whether or not the plaintiff and defendant were competitors for the sale of paint to CMI Corporation, with the plaintiff contending that in light of the affidavit by John P. Evans and the absence of any counter-affidavit by the defendant, that the defendant is not in good faith in controverting the plaintiff's allegation that the plaintiff and defendant were competitors for the sale of paint to CMI Corporation and similar customers.

IT IS THEREFORE ORDERED that the plaintiff's motion for judgment on the pleadings and motion for summary judgment is OVERRULED, and further, that this matter be set down for trial on Monday, June 19, 1978, at 9:00 a.m. and for pre-trial conference on May 24, 1978, at 9:30 a.m.

* * *

(s) *David M. Cook*
JUDGE OF THE DISTRICT COURT

# Opposition

Office - Supreme Court, U.S.
FILED
JAN 22 1982
ALEXANDER L. STEVAS,

No. 81-1162

# In the Supreme Court of the United States

OCTOBER TERM, 1981

CROWN PAINT COMPANY, a Coporation,
*Petitioner,*

VERSUS

GEORGE BANKSTON, JR., an Individual,
*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CARL HUGHES
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200 North Harvey
Oklahoma City, Oklahoma 73102
(405) 236-2430

*Attorney for Respondent upon whom service is to be made*

January, 1982

## THE QUESTIONS PRESENTED

1. Whether a contract between the manufacturer of paint (Petitioner Crown Paint Company) and a retailer of paint (Respondent George Bankston, Jr.) in which they agreed not to compete on a retail level, was a *per se* violation of 79 O.S. §1 (1971), and/or a violation of 15 O.S. §217.

2. Should the Petitioner's Motion for Summary Judgment, Motion for Directed Verdict, or Motion for Judgment Notwithstanding the Verdict been granted because the contract was void and unenforceable?

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CERTIFICATE OF SERVICE follows Brief.

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No. 81-1162

In the
Supreme Court of the United States
OCTOBER TERM, 1981

CROWN PAINT COMPANY, a Coporation,
*Petitioner,*

VERSUS

GEORGE BANKSTON, JR., an Individual,
*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma**

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## THE OPINION BELOW

Respondent has no objection to the statements as to the opinion below set forth in Petition for Writ of Certiorari and has therefore omitted the same in the interest of making this response concisely to the point.

## STATEMENT OF JURISDICTION

Respondent has no objection to the statements as to the statement of jurisdiction set forth in Petition for Writ of Certiorari and has therefore omitted the same in the interest of making this response concisely to the point.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent has no objection to the statements as to the constitutional and statutory provisions involved set forth in the Petition for Writ of Certiorari and has therefore omitted the same in the interest of making this response concisely to the point.

## STATEMENT OF CASE

After 16 years of working in the paint business, in 1973 the Respondent George Bankston, Jr. opened his own paint supply company as a sole proprietor. He was primarily engaged in the business of purchasing from manufacturers and reselling to his personal customers, paints and paint related products.

Bankston's largest customer was CMI Corporation which purchased the majority of its paint and paint related products for use in painting its road grading equipment. Bankston, needing a source to have a continuous supply of paint for resale, contacted the Petitioner, through its president, and the parties entered into a contract whereby the Petitioner, a manufacturer, wholesaler and retailer of paint and paint related products, agreed that it would not call on any customers Bankston was selling Crown products to and that if Crown ever found out that it was selling to one of Bankston's customers, Crown would back out.

Ultimately, Crown acting in its retail capacity, did call upon and sell paint to Bankston's largest customer, CMI Corporation.

Crown then filed a suit on open account against Bankston seeking to collect for payment for paint sold to Bankston. Bankston admitted that he had not paid for the paint, confessed judgment and filed a counter-claim alleging Crown's breach of their contract agreement. Crown was not restrained from exercising its lawful profession of manufacturing, wholesaling and selling paint, but merely restricted from selling paint to Bankston's clients, which at most was a limited restriction on the manner in which the business of Crown was done and did not restrain Crown from exercising its business in general.

Upon trial of Bankston's counter-claim, he was awarded judgment with the jury fixing damages at $67,259.97. In the opinion below, the Oklahoma State Supreme Court unanimously affirmed the trial court's rulings and denied Crown's Petition for Rehearing. Whereupon, this Petition for Writ of Certiorari was filed.

Petitioner describes this case as an anti-trust action; however, the same questions raised in its Petition for Writ of Certiorari were reviewed in the opinion of the Oklahoma State Supreme Court, which noted that the Petitioner here failed to present any evidence showing an illegal scheme or unreasonable restraint in a given market (Petitioner's Appendix, page 1). And further stated in its opinion:

> "As there was no evidence before the trial court to support any of Crown's anti-trust arguments, the trial court did not err as a matter of law in overruling Crown's motion for summary judgment or motion for judgment notwithstanding the verdict, or Crown's proposed instructions." (Petitioner's Appendix, p. 7a)

## ARGUMENT

Petitioner offered absolutely no evidence whatsoever to show any monopolistic arrangement or of any unreasonableness as to any alleged restraint of trade, and therefore failed to put on any evidence and sustain any burden whatsoever as to the requirement of proving a violation of the rule of reason.

As stated in an earlier opinion by the Oklahoma Supreme Court, in the case of *Teleco, Inc.* v. *Ford Industries, Inc.*, 587 P.2d 1360 (Okla. 1978):

> "Only unreasonable restraint of trade as measured by the 'rule of reason,' constitutes a violation of 79 O.S. §1."

The court stated that the rule of reason must apply and in order to determine the unreasonableness of a given restraint the courts have used a "relevant market analysis" and a definition of the market which is supposedly unreasonably restrained. In the case at bar there was no evidence before the trial court demonstrating the existence of an illegal scheme, or defining a relevant submarket on which a possible illegal monopoly might exist, therefore, as in the *Teleco* case, the Petitioner failed to support any of its allegations with any evidence.

Courts in all jurisdictions in the United States have continually held that an agreement of the kind involved in the case at bar, to-wit, between a manufacturer and a customer/distributor setting up an exclusive territory within which the customer/distributor will have exclusive rights to sell does not in itself violate anti-trust provisions. See *United States* v. *Arnold, Schwinn and Company*, 388 U.S.

365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967); *Colorado Pump Supply Company* v. *Febco, Inc.*, 472 F.2d 637 (10th Cir. 1973); *Tarp-All Varieties, Inc.* v. *Hallmark Cards, Inc.*, 301 F.Supp. 703 (S.D. N.Y. 1969); *Packard Motorcar Company* v. *Webster Motorcar Company*, 243 F.2d 418 (1957); *Schwing Motor Company* v. *Hudson Sales Corporation*, 239 F.2d 176 (4th Cir. 1956).

In this instance the exclusive territory within which Bankston had exclusive rights to sell was Bankston's customers, primarily CMI. As set out in *United States* v. *Arnold, Schwinn and Company*, supra and *Teleco, Inc.* v. *Ford Industries, Inc.*, supra, an agreement between a manufacturer and a customer allocating a specific limited territory exclusively to the customer, with competitive products readily available to others, has invariably been permitted as a reasonable restraint of trade.

Bankston put on evidence to clearly indicate that there were saleable lines of other paint products manufacturers which were fully available to Bankston's customers, including CMI. Therefore, there was nothing in the agreement which made out a case for anti-trust violation.

In the case of *Cooper* v. *Tanaka*, 591 P.2d 1181 (Okla. App. 1978), the court realized literal interpretation of 79 O.S. §1 would be impossible as "taken literally, 79 O.S. §1 would be incapable of administration since virtually all contracts restrain some trade." Therefore, Crown's argument that this legislation requires strict interpretation must go by the wayside as such argument did in the early days of Section One of the Sherman Act and has to be replaced with a literal interpretation of the "rule of reason."

## CONCLUSION

The Respondent submits that a writ of certiorari should not be granted in this case for the following reasons:

1. The Petitioner's Brief is riddled with inaccuracies and personal innuendoes which, under the United States Supreme Court Rule 23(4), is sufficient reason for denying the petition.

2. The rulings of two prior courts have shown that the Petitioner has failed to present any evidence showing an illegal scheme, or unreasonable restraint on a given market and that there was no evidence before the trial court to support any of Crown's anti-trust arguments.

3. To the contrary, the evidence was unrefuted that Crown manufactured the paint, Bankston sold to the ultimate consumer and the relationship between Crown and Bankston was that of manufacturer and dealer. The agreement under consideration was between a manufacturer and a dealer not two manufacturers or not two dealers. The agreement was by Crown as manufacturer and Bankston as its dealer that Crown would not sell to others within Bankston's exclusive territory. This being the case the agreement in question was simply an agreement between a manufacturer Crown and its customer Bankston allocating a specific limited territory exclusively to the customer, with competitive products readily available from others. Thus, there is nothing in the agreement which makes out a case of anit-trust violations.

4. The ruling of the Oklahoma Supreme Court does not present an important question of federal law unsettled

by this Court or one in conflict with applicable decisions of this Court or a case otherwise calling for the supervision of this Supreme Court of the United States as contemplated by United States Supreme Court Rule 19.

WHEREFORE, the Respondent respectfully requests that certiorari be denied.

Respectfully submitted,

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Oklahoma City, Oklahoma 73102
(405) 236-2430

*Attorney for Respondent*
*upon whom service is to be made*

January, 1982

**CERTIFICATE OF SERVICE**

I hereby certify that on the _____ day of January, 1982, three (3) copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Counsel for the Petitioner, as follows:

Mr. Bryce A. Baggett
200 N.W. 63rd Street
Oklahoma City, Oklahoma 73116

and I further certify that all parties required to be served have been served.

_____

CARL HUGHES

# Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
JAN 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1162

# In the Supreme Court of the United States

OCTOBER TERM, 1981

CROWN PAINT COMPANY, a corporation,
*Petitioner,*

VERSUS

GEORGE BANKSTON, JR., an individual,
*Respondent.*

## REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRYCE A. BAGGETT
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*Attorney for Petitioner*
*upon whom service is to be made*

January 29, 1982

## REPLY TO RESPONDENT'S VERSION OF THE QUESTION PRESENTED

The Question Presented on page i of the Petition is, in essence, whether this contract not to compete, made between competitors, constituted a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

The respondent's brief at page i restates the question as if it arose only under two Oklahoma statutes, 79 O.S. §1 and 15 O.S. §217. Respondent's version of the question ignores 15 U.S.C. §1 as does respondent's brief.

This Petition is based exclusively upon the Federal statute, 15 U.S.C. §1. The petitioner's complaint is that the Supreme Court of Oklahoma refused (albeit tacitly) to apply 15 U.S.C. §1 to the facts in this case, thereby depriving the petitioner of its rights under Federal law.

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No. 81-1162

In the
Supreme Court of the United States
OCTOBER TERM, 1981

CROWN PAINT COMPANY, a Coporation,
*Petitioner,*

VERSUS

GEORGE BANKSTON, JR., an Individual,
*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma**

# REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

This is the petitioner's Reply to the Brief in Opposition to Petition for Writ of Certiorari which was filed by the respondent on January 22, 1982. The respondent's Brief in Opposition will be referred to herein as "the respondent's brief."

## REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The Statement of the Case on pages 2 and 3 of the respondent's brief does not dispute petitioner's Statement of the Case. On page 2 the respondent acknowledges the most important fact relied upon by petitioner, *i.e.*, that Crown was a retailer in competition with Bankston for the custom of CMI.

Petitioner disputes the statement in the last paragraph on page 3 of respondent's brief that ". . . the same questions raised in its Petition for Writ of Certiorari were reviewed in the opinion of the Oklahoma State Supreme Court . . ." One of petitioner's complaints about the opinion of the Oklahoma Supreme Court is that it did not *review* Crown's Federal questions. Instead, the opinion below *silently* adjudicated and *tacitly* rejected Crown's argued claim of Federal rights under 15 U.S.C. §1.

It is not true (as stated on page 3 of respondent's brief) that Crown ". . . failed to present any evidence showing an illegal scheme or unreasonable restraint . . ." Crown's cross-examination of Bankston drew his admission that he and Crown were competitors for the CMI business, *but for* the alleged contract not to compete. Bankston testified:

Question: "And CMI is the kind of customer that any paint company would like to sell to, aren't they?"

Bankston: "That's correct."

Question: "And in the ordinary course of business, you and Crown Paint Company would have been competitors for that business, wouldn't you?"

Bankston: "We would have been except I had agreement with John Evans."

Question: "Except for that agreement, wouldn't you?"

Bankston: "Yes."

Question: "In other words, if you hadn't made such a bargain with John Evans, it would have been very natural for Crown Paint Company to go out there and compete with you for that business?"

Bankston: "That's right."

Question: "So then the purpose of this agreement was to keep them from competing; is that correct?"

Bankston: "The purpose of the agreement was to have a protective account. That is a common agreement in the paint industry."

Such evidence was sufficient to establish that the contract not to compete was made between competitors and, therefore, was "an illegal scheme" and an "unreasonable restraint" *per se* under 15 U.S.C. §1.

## REPLY TO RESPONDENT'S ARGUMENT

The argument on pages 4 and 5 of respondent's brief is not responsive to the Petition. Rather, it is an Argument on the merits which is premature at this stage. Petitioner is obliged to reply to three points lest silence be taken for acquiescence.

Contrary to the respondent's statement (first paragraph of respondent's Argument), Crown did offer evidence "... to show ... unreasonableness (of the) alleged restraint of trade ..." By the affidavit of John P. Evans (pages 11a and 12a of Appendix to Petition) and by the above quoted testimony of Bankston, Crown offered evidence to prove that Crown and Bankston were competitors when they made the alleged contract not to compete for the sale of paint to CMI Corporation. This evidence proved unreasonableness *per se* of that contract under 15 U.S.C. §1.

The gist of respondent's Argument (pages 4 and 5) is that this contract not to compete should be judged by the "rule of reason" as a vertical restraint between a manufacturer and a retailer. Crown replies that because Crown was also a retailer who competed with Bankston in the ordinary course of business, this contract constitutes a *horizontal* restraint which is *per se* unreasonable.

> "One of the classic examples of a per se violation of §1 (of the Sherman Act) is an agreement between competitors at the same levels of the market structure to allocate territories (customers?) in order to minimize competition." (parenthetical words added) — *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 609, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972).

If horizontal allocation of territories is a per se violation of Section 1 of the Sherman Act, it logically follows that horizontal allocation of customers is also a per se violation.

The first paragraph on page 5 of respondent's brief reiterates the Oklahoma Supreme Court's statement that Bankston's customers constituted an "exclusive territory within which Bankston had exclusive rights to sell . . ." (See the opinion below at page 6a of the Appendix to the Petition). None of the six cases cited on pages 4 and 5 of respondent's brief support that novel proposition that particular customers can constitute "an exclusive territory." Crown replies that an allocation of customers between competitors cannot be legitimized by calling the allocated customers an "exclusive territory."

## REPLY TO RESPONDENT'S BRIEF AS TO THE REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

In the "Conclusion" on pages 6 and 7 of his brief, the respondent submits four reasons why, in his opinion, the writ of certiorari should not be granted. Petitioner will reply thereto using the numbers designated by respondent.

1. Petitioner vouches to this Court that its Petition is accurate as to every matter stated. There are no "personal innuendoes" in the Petition.

2. It is true that the trial court and the Oklahoma Supreme Court did not consider petitioner's evidence — that Crown and Bankston were competitors when they allegedly made the contract not to compete for the custom of CMI — to be sufficient evidence of "an illegal scheme" or an "unreasonable restraint." However, the complaint of this Petition is that those two courts *thereby* erred as a matter of Federal law under 15 U.S.C. §1. Such evidence constituted conclusive proof that the contract not to compete was horizontal and, therefore, unreasonable per se and illegal.

3. As respondent states, Crown did not dispute the evidence that there was a manufacturer and dealer relationship between Crown and Bankston. Likewise, Bankston did not dispute that he and Crown were actually competitors for the sale of paint to CMI Corporation, but for the contract not to compete. (See page 3 of this Reply.) This latter fact is controlling over the former in determining the horizontal character of this contract under Section 1 of the Sherman Act. Bankston's purpcse in this contract

was to prevent Crown from competing with him, as Crown would do in its ordinary course of business, for the business of CMI. The pernicious effect on competition of this contract fits the per se rule:

> "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal . . ." — *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).

4. The ruling of the Oklahoma Supreme Court does present several important questions of Federal law which are unsettled by this Court. Those unsettled Federal questions are stated on pages 7 through 13 of the Petition and will not be repeated here except to emphasize the following one.

This case presents a singularly important question of Federal law which is unsettled by this Court, *i.e.*, whether an allocation of customers between competitors constitues a per se violation of Section 1 of the Sherman Act. The Courts of Appeal for the Second and Fifth Circuits have held to that effect (See 3 at pages 10 and 11 of the Petition), but this Court has not yet published an opinion in which it has ruled specifically that allocation of customers between competitors is per se illegal under 15 U.S.C. §1.

## CONCLUSION

State courts and small businessmen often misperceive antitrust law as applying only to big business, not to small business. Encouraged by judicial tolerance of the type exemplified by the opinion below, small businessmen are making contracts not to compete in ever greater frequency. It should be especially noticed that respondent Bankston, testified, "This is a common agreement in the paint industry" (page 3 of this Reply). Such agreements have become all too common. It is time to put a stop to them.

Although the amount involved here is relatively small,[1] the principle of free competition at stake in this case is great. In *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 611, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972), this Court said that the freedom to compete is important:

> "Antitrust laws in general, and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, *no matter how small*, is the freedom to compete — to assert with vigor, imagination, emotion, and ingenuity whatever economic muscle it can muster." (emphasis supplied)

Contracts not to compete are inimical to our free enterprise system. Their growing prevalence is pernicious to the economy of the United States. By granting certiorari in

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[1] The judgments plus accrued interest total $96,646.81 which is *not* small to Crown Paint Company or its owners, John and Faye Evans.

this case the Court can give meaning to the freedom to compete and be able to rule (for the first time in a case uncluttered by other issues) that contracts not to compete made between competitors are per se violations of the Sherman Act.

Respectfully submitted,

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*upon whom service is to be made*

January 29, 1982

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of January, 1982, three (3) copies of this Reply Brief of Petitioner were mailed, postage prepaid, to Counsel for the Respondent as follows:

Mr. Carl Hughes and
Mr. Michael Gassaway
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802 Park Harvey Center
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and I further certify that all parties required to be served have been served.

_____

Bryce A. Baggett